NO. 42793-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TROY L. PERKINS
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Leila Mills, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by imposing the following conditions of release that are unconstitutionally vague:

> 12) Possess/access no sexually exploitative materials (as defined by defendant's treating therapist or Community Corrections Officer), frequent no adult bookstores, arcades, or places providing sexual entertainment, and access no pornographic sexually explicit materials and/or information pertaining to minors via computer, i.e. Internet.
>
> 15) Do not loiter or frequent places where children congregate including but not limited to, shopping malls, schools, playgrounds and video arcades.

2. The trial court erred by imposing sentencing conditions that are not crime-related:

> 13) Contact no "900" numbers that offer sexually explicit material. ....
>
> 18) Do not hitchhike or pick up hitchhikers.

ISSUE STATEMENTS

1. Are prohibitions on the possession of or access to sexually exploitative materials (as defined by defendant's treating therapist or Community Corrections Officer), frequent no adult bookstores, arcades, or places providing sexual entertainment, and access no pornographic sexually explicit materials and/or information pertaining to minors via computer, i.e. Internet "pornographic materials unconstitutionally facially vague?

2. Are the prohibitions against loitering or frequent shopping malls. unconstitutionally facially vague?

3. Do the above prohibitions violate the constitutional right to free speech?

4. Do the sentencing conditions fail to satisfy the condition that they are crime-related?

B. STATEMENT OF THE CASE

Troy Perkins pleaded guilty to sexual exploitation of a minor acting as an accomplice. RCW 9.68A.040'CP 1-7. Mr. Perkins agreed to an exceptional sentence of 100 months to avoid life in prison as a two strike sex offender. CP 10-15; RP[1] 6. 7. 8; 1RP[2] 4, 5

Sentencing Conditions

Defense challenged a number of the sentencing conditions on grounds that the prohibitions were void for vagueness or were not crime related. 1RP 6-10. [3]

Counsel challenged the following portions of the sentencing conditions:

> 12) **Possess/access no sexually exploitative materials (as defined by defendant's treating therapist or Community Corrections Officer), frequent no adult bookstores, arcades, or places providing sexual**

[1] RP refers to the plea hearing held August 31. 2011.
[2] 1RP refers to the sentencing hearing held October11, 2011.
[3] Judgment and Sentence Appendix F contains the conditions of sentence and is attached as Appendix A.

> **entertainment, and access no pornographic sexually explicit materials** and/or information pertaining to minors via computer, i.e. Internet.
>
> 13) **Contact no "900" numbers that offer sexually explicit material**. ....
>
> 15) **Do not** loiter or **frequent places where children congregate including but not limited to, shopping malls**, schools, playgrounds and video arcades.
>
> 18) **Do not hitchhike or pick up hitchhikers.**

(Emphasis added) CP 47-56.

C. ARGUMENT

1. THE SENTENCING CONDITIONS INFRINGE ON PERKIN'S CONSTITUTIONAL RIGHTS TO FREE SPEECH.

Washington sentencing courts are required to impose certain community custody conditions in specified circumstances and may impose others. RCW 9.94A.505; *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). In Perkin's case the trial court's vague sentencing prohibitions violated Perkin's right to free speech as guaranteed Const. art. I, § 5; and the First Amendment. Due process vagueness problems often implicate and overlap with first amendment concerns. State v. Bahl, 164 Wn.2d 739, 757, 193 P.3d 678 (2008); *See, e.g., Colautti v. Franklin*, 439 U.S. 379, 391, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979) (need for fair notice

and strict enforcement standards "especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights."); *Smith v. Goguen*, 415 U.S. 566, 573, 94 S. Ct. 1242, 39 L.Ed.2d 605 (1974) ("Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts."); *NAACP v. Button*, 371 U.S. 415, 432, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963) ("[S]tandards of permissible statutory vagueness are strict in the area of free expression.").

The challenged sentencing conditions plainly restrict Perkin's right to free speech by vaguely prohibiting him from visiting malls, adult bookstores reading certain literature or viewing particular types of entertainment except as approved by a therapist of probation officer. In this circumstance, "the problems of vagueness and overbreadth are, plainly, closely intertwined." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 88 n.10, 93 S. Ct. 2628, 2650, 37 L. Ed. 2d 446 (1973) (Brennan, J. dissenting); *United States v. Jeter*, 775 F.2d 670, 678 (6th Cir. 1985) (Fifth Amendment void-for-vagueness argument "is intertwined with" First Amendment overbreadth argument; court agrees when overbroad law covering speech "and formless standards of first amendment privileges are

conjoined, the result is an operative, injurious legal reality suffering due process vagueness."), *cert. denied*, 475 U.S. 1142 (1986).

A criminal defendant may bring a facial vagueness challenge to a sentence condition when the condition implicates the First Amendment right to free speech. *State v. Halstien*, 122 Wn.2d 109, 117, 857 P.2d 270 (1993). Such a challenge may be brought where an ordinance is not vague in all of its applications if it "reaches 'a substantial amount of constitutionally protected conduct.'" *City of Sumner v. Walsh*, 148 Wn.2d 490, 513, 61 P.3d 1111 (2003) (*quoting Kolender v. Lawson*, 461 U.S. 352, 357 n.8, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)).

A different analysis applies where the challenged provisions implicate fundamental constitutional rights such as the freedoms of speech, assembly or association. First, a purportedly vague law might have a chilling effect on fundamental constitutional rights and important activities. *Walsh*, 148 Wn.2d at 513. Second, the discretion to selectively enforce a vague law is especially dangerous when the law regulates a fundamental right such as speech. *Walsh*, 148 Wn.2d at 513. Third, the First Amendment needs "'breathing space'" and acceptable government regulation must accordingly be drawn with "'narrow specificity.'" *Walsh*, 148 Wn.2d at 513 (*citing* 4 Ronald D. Rotunda & John E. Nowak, *Treatise*

on Constitutional Law § 20.9 (3d ed.2002) (*quoting NAACP v. Button*, 371 U.S. at 433).

The First Amendment protects the right to hear and to receive as well as to speak. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 756-57, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976). Obscene speech, however, is beyond the coverage of the First Amendment. *Roth v. United States*, 354 U.S. 476, 484-85, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957).

A work falls outside the protective scope of the First Amendment only if (1) when taken as a whole, according to community standards, it appeals to the prurient interest, (2) it depicts, in a patently offensive way, sexual conduct as defined by state law, and (3) when taken as a whole, the work lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). Sexually-oriented work is not obscene unless all three elements of the Miller test are satisfied. *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102*, 709 F.2d 132, 135 (2d Cir.1983).

The First Amendment protects some material that is arguably pornographic because many items that might be considered pornography may not be obscene under *Miller*. *United States v. Loy*, 237 F.3d 251, 262-63 (3d Cir.2001) (*citing Various Articles of Obscene Merchandise*,

709 F.2d at 137, upholding trial court determination that the film Deep Throat was not patently offensive by the community standards of New York); *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353, 1373 (5th Cir.1980) (holding the January 1978 issue of Penthouse, but not Playboy, was obscene); *see also American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 334 (7th Cir.1985) (striking down on First Amendment grounds a statutory prohibition on pornographic material).

Although the scope of the term obscenity has been exhaustively examined, the term pornography has not been precisely defined by the federal courts or statutes. *Loy*, 237 F.3d at 263; *cf. Farrell v. Burke*, 449 F.3d 470, 487 (2nd Cir. 2006) (discussing two cases in which the Second Circuit found defendants had notice of the meaning of "pornography" in conditions of supervised release because statute they were convicted of violating provided detailed definition of "child pornography").

That said, it is undisputed convicted felons sentenced to a term of supervised release do not necessarily have the same unlimited rights as those enjoyed by other persons. Instead, a defendant's constitutional rights while serving community placement are subject to restrictions authorized by the SRA; *State v. Riles*, 135 Wn.2d 326, 347, 957 P.2d 655 (1998), *abrogated on other grounds in State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010). Nonetheless, in order to avoid the reach of a First

Amendment challenge, a condition of supervised release must be narrowly drawn and related to protect the public and promote rehabilitation. *Loy* 237 F.3d at 264 (citing *United State v. Crandon*, 173 F.3d 122, 128 (3d. Cir.)), *cert. denied*, 528 U.S. 855 (1999).

Because the prohibitions at issue here involve Perkin's First Amendment rights, the conditions must be evaluated for vagueness on their face. *Halstien*, 122 Wn.2d at 117. None of the challenged conditions in Perkin's case provides an ascertainable standard of "guilt" to notify Perkins what materials are prohibited, nor does it protect against arbitrary enforcement by law enforcement. And the vagueness problem is exacerbated, not cured, by the inclusion of a requirement that pornographic materials are to be defined by the therapist or CCO. CP 47-56. Were Perkin to run across pornographic materials, he would be unable to ascertain whether they were pornographic without showing them to his therapist. At that point, however, he would have already possessed, and possibly perused, the materials, subjecting him to punishment.

2. PERKIN'S COMMUNITY CUSTODY CONDITIONS ARE UNCONSTITUTIONALLY VAGUE.

The due process clauses of the federal and state constitutions require that citizens have fair warning of what conduct is illegal. U.S. Const. amend. XIV; Const. art. I, § 3, Bahl, 164 Wn.2d at 752. As a

result, a condition of community custody must be sufficiently definite that ordinary people understand what conduct is illegal and the condition must provide ascertainable standards to protect against arbitrary enforcement. Bahl, 164 Wn.2d 752–53. Additionally, even offenders on community custody retain a constitutional right to free expression. See Procunier v. Martinez, 416 U.S. 396, 408–09, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) (inmates retain First Amendment right of free expression through use of the mail). When a condition of community custody addresses material protected by the First Amendment, a vague standard may have a chilling effect on the exercise of First Amendment rights. Bahl, 164 Wn.2d at 752. An even stricter standard of definiteness therefore applies when a community custody condition prohibits access to material protected by the First Amendment. Id.

A defendant may assert a pre-enforcement vagueness challenge to sentencing conditions if the challenge is sufficiently ripe. *Bahl*, 164 Wn.2d at 751. Vagueness challenges are sufficiently ripe for review even if the conditions of community custody do not yet apply because the defendant is still in prison, since upon his release the conditions will immediately restrict him. *Bahl*, 164 Wn.2d at 751-752. The challenge is also ripe because it is purely legal, i,e. whether the condition violates due process vagueness standards. *Bahl*, 164 Wn.2d at 752.

When deciding whether a term is unconstitutionally vague, the terms are considered in the context in which they are used. *Bahl*, 164 Wn.2d at 754, citing, *City of Spokane v. Douglass,* 115 Wn.2d 171, 180, 795 P.2d 693 (1990). When a statute does not define a term, the court may consider the plain and ordinary meaning as set forth in a standard dictionary. *State v. Sullivan*, 143 Wn.2d 162, 184–85, 19 P.3d 1012 (2001). "A statute is void for vagueness if persons of common intelligence must necessarily guess at its meaning and differ as to its application." *State v. Hirschfelder*, 170 Wn.2d 536, 549, 242 P.3d 876 (2010), quoting, *State v. Glas*, 147 Wn.2d 410, 421, 54 P.3d 147 (2002).

In this case, many of the trial courts sentencing conditions are not understandable by an ordinary person relying on their common usage and are therefore unconstitutionally void for vagueness. Mr. Perkins specifically challenges all or portions of numbers: 12, 13, 15, 18, and 20. These conditions prohibiting Perkin from having possessing or accessing "sexually exploitative materials (as defined by defendant's treating therapist or Community Corrections Officer)" and from "accessing pornographic sexually explicit materials and/or information" and from loitering in shopping malls, are all unconstitutionally vague. *Bahl*, 164 Wn.2d at 765.

The vagueness doctrine requires that where the challenged law

involves First Amendment rights, a greater degree of specificity is needed. *Bahl*, 164 Wn.2d at 757. To satisfy this greater degree of specificity, fundamental rights may be limited only if "imposed sensitively" *Bahl*, 164 Wn.2d at 757, quoting, *Riley*, 121 Wn.2d at 37, and "if reasonably necessary to accomplish the essential needs of the state and public order." *Riley*, 121 Wn.2d at 37–38, quoting, *Malone v. United States*, 502 F.2d 554, 556 (9th Cir.1974)).

Adult pornography is constitutionally protected speech. *Bahl*, 164 Wn.2d at 757. And the term "pornography" is unconstitutionally vague. *Bahl*, 164 Wn.2d at 757-758. In *Bahl*, the State Supreme Court struck similar language in Bahl's sentencing conditions. *Bahl*, 164 Wn.2d at 758. In *Bahl*, the defendant like Perkins was restricted from possessing or accessing pornographic material.

> Do not possess or access pornographic materials, as directed by the supervising Community Corrections Officer. Do not frequent establishments whose primary business pertains to sexually explicit or erotic material.
>
> Do not possess or control sexual stimulus material for your particular deviancy as defined by the supervising Community Corrections Officer and therapist except as provided for therapeutic purposes.

Bahl, 164 Wn.2d at 743.

In *Bahl*, the State Supreme Court held that "the restriction on accessing or possessing pornographic materials was unconstitutionally vague" because the condition was completely subjective, allowing the community corrections officer to determine what fell within the condition which "virtually acknowledges that on its face it does not provide ascertainable standards for enforcement." *Bahl*, 164 Wn.2d at 758.

a. "Possess/Access No Sexually Exploitative Materials (As Defined By Defendant's Treating Therapist or Community Corrections Officer)."

"Sexually explicit conduct" is statutorily defined under RCW 9.68A.011(4). "Sexually explicit conduct" means actual or simulated." RCW 9.68A.040(1)(b) provides that a person is guilty of sexual exploitation of a minor if he or she "[a]ids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance[.]"The term "sexually exploitative material" is not statutorily defined.

Here, the trial court delegated the definition of "sexually exploitative material" to the CCO or treating therapist. The Court in *Bahl*, held that when a sentencing condition is subjectively defined by a CCO this "virtually acknowledges that on its face it does not provide ascertainable standards for enforcement." *Bahl*, 164 Wn.2d at 758. Here,

because of its subjectivity, the term "sexually exploitative material" "as defined by a CCO or therapist" is unconstitutionally void for vagueness. Id. To remedy the First Amendment violations, this language must be removed from the sentencing condition

b. "Pornographic Sexually Explicit Material"

Present in Perkin's case is the language "sexually explicit" pornographic material". The Court in *Bahl* held that "sexually explicit" is broader than the term "pornographic." *Bahl, 164 Wn.2d at 766, quoting, Loy*, 237 F.3d at 264. The Court in *Bahl*, held that the phrase "sexually explicit material" was sufficiently definable to survive a vagueness challenge, but the phrase "sexually explicit" does not provide a definition for the term "pornographic". Rather it indicates that in addition to the term "pornographic" such material cannot also be "sexually explicit ".

The term "sexually explicit" may be subject to specific definition but when added to the undefined term "pornographic" the phrase remains as vague as the term "pornographic" standing alone. If the trial court wanted to prohibit access to all "sexually explicit material" it could have done so as it did in *Bahl* where the Court upheld a condition that prohibited the defendant from frequenting businesses that offered "sexually explicit" and " erotic materials". *Bahl*, 164 Wn.2d at 759. The trial court herein did not however choose to make this prohibition when

attempting to prohibit access and possession of "pornographic" material. Rather the trial court attempted to prohibit access and possession of "pornographic sexually explicit material" which under *Bahl,* is constitutionally vague. For this reason, this Court must reverse and remand the condition containing this language s.

c. No Frequenting "Shopping Malls"

The trial court's sentencing condition number 15 attempts in part to prohibit Perkins "frequenting" "shopping malls". The Court in *Bahl* determined that in a similar context the term "frequent" meant a complete ban: "may not visit at all". *Bahl*, 164 Wn.2d at 758. At 758. The ban herein on ever going into a "shopping mall" is unconstitutionally vague. "Shopping Mall" is defined as:

> 1. An urban shopping area limited to pedestrians.
>
> 2. A shopping center with stores and businesses facing a system of enclosed walkways for pedestrians.

The American Heritage® Dictionary of the English Language, 4th edition Copyright © 2010 by Houghton Mifflin Harcourt Publishing Company. Published by Houghton Mifflin Harcourt Publishing Company. "While the mall is the archetypal 'shopping center,' all shopping centers do not

necessarily take the form of shopping malls." *In re Joshua Slocum Ltd.*922 F.2d 1081, 1087 C.A.3 (Pa.) 1990.

Under these broad definitions, a shopping mall could include a Safeway with an attached Starbucks inside, a Safeway with a Hallmark store next door, any supermarket with a bank or florist or any other separate business inside. The term "shopping mall" does not provide ascertainable standards to discern its meaning. If Perkins went inside a Safeway to purchase a coffee from a Starbucks stand, he could potentially violate condition of sentencing number 15. If Perkins used a bank kiosk inside another store he again could be subject to a violation of condition #15.CP 47-56. *Bahl*, 164 Wn.2d 752–53.

Because this specific prohibition against frequenting shopping malls involves the First Amendment it must be both "sensitively imposed" and "reasonably necessary to accomplish the essential needs of the state and public order. *Bahl*, 164 Wn.2d at 757 (citations omitted). A term that cannot be described with specificity and one that can encompass any supermarket with a separately owned kiosk or store inside is not sensitively imposed nor reasonably necessary to accomplish the essential needs of the state and public order, i.e. to protect minors.

Without defining "shopping malls," "pornograpic sexually explicit material", or "sexually exploitive materials" with a list of concrete

examples of what is prohibited, a court's sentencing conditions that purport to ban access to these materials and locations is necessarily unconstitutionally vague. And that is the problem in Perkin's case. As in *Bahl*, this Court must remand for reversal the offending portions of sentencing conditions: 12, 13, 15, 18 and 20 and

d. Crime Related Prohibitions

Washington sentencing courts are required to impose certain community custody conditions in specified circumstances and may impose others. RCW 9.94A.505; *Warren*, 165 Wn.2d at 32. One condition that may be imposed is that an offender "shall comply with any crime-related prohibitions." RCW 9.94A.030; Appendix F explicitly states that all of the sentencing conditions are crime related thus in this case, all of the sentencing conditions must be crime-related.

RCW 9.94A.030(10) defines crime-related as follows:

> (10) "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

Id.

The standard of review for a trial court's imposition of crime-related prohibitions that interfere with a fundamental constitutional right is a heightened abuse of discretion standard that requires sentencing conditions be "sensitively imposed" so that they are "reasonably necessary to accomplish the essential needs of the State and public order." *State v. Rainey*, 168 Wn.2d 367, 374-75. 229 P.3d 686 (2010). Thus a court abuses its discretion if, when imposing a crime-related prohibition, it applies the wrong legal standard. *Rainey*, 168 Wn.2d at 374-375, citing, *State v. Lord,* 161 Wn.2d 276, 284, 165 P.3d 1251 (2007). The standard of review for challenges to a conditions of community custody on vagueness grounds is for abuse of discretion. *Valencia*, 169 Wn.2d at 793.

> "THUS, WE DO NOT PResume the condition here is constitutional. as in *Bahl,* we apply an abuse of discretion standard of review, and if the condition is unconstitutionally vague, it will be manifestly unreasonable. *Bahl,* 164 Wash.2d at 753, 193 P.3d 678.

Valencia, 169 Wn.2d at 793.

Preventing Perkins from "hitchhiking and picking up hitchhikers; and prohibiting contacting "900" numbers that offer sexually explicit material and prohibiting frequenting places that offer adult entertainment are not-crime-related and implicate fundamental first amendment rights.

In *State v. Riley*, 121 Wn.2d 22, 36, 846 P.2d 1365 (1993), the defendant was convicted of computer trespass and, as part of the sentence, forbidden to possess a computer, associate with other computer hackers, or post on computer bulletin boards for the duration of his sentence. *Riley*, 121 Wn.2d at 36. The State Supreme Court held that it did not violate Riley's fundamental freedom of association to impose these limitations because they were reasonably necessary to prevent Riley from committing further crimes. *Riley*, 121 Wn.2d at 38. Simply put, the conditions eliminated the defendant's access to the means through which he committed his crime.

By contrast, here the trial court's conditions preventing Perkins from hitchhiking and picking up hitchhikers; prohibiting contacting "900" numbers that offer sexually explicit material; and prohibiting frequenting places with adult sexual content material are not-crime-related because the crime herein involved sexual exploitation of minors and was not related to sexual crimes against adults.

These sentencing conditions are not narrowly tailored or sensitively imposed; they are broad and beyond the scope of the crime. Narrowly tailored conditions might specify no hitching with minors in the car and no picking up minors. To the extent "900" numbers and adult bookstores and adult entertainment centers are regulated and licensed

business, it is reasonable to assume that they do not contain illegal depictions or descriptions of children involved in any sort of sexual activity.

An example of a local regulation of adult entertainment is as follows. The Seattle Municipal Code enacted regulatory licensing in the adult entertainment field to protect against the exploitation of minors: SMC 6.270.010 findings of fact.

> C. It is necessary to license entertainers in the adult entertainment industry to prevent the exploitation of minors; to ensure that each such entertainer is an adult; and to ensure that such entertainers have not assumed a false name, which would make regulation of the entertainer difficult or impossible.

In addition to protecting minors against exploitation, minors are also prohibited from entering any adult entertainment establishment. SMC 6.270.140. With these legal realities in place, it is not possible to describe sentencing conditions as crime-related prohibitions when the prohibition is cannot be related to the crime, because minors are not allowed to frequent these locations. RCW 9.94A.030(10).

D. CONCLUSION

For the reasons discussed herein this Court should reverse the challenged sentencing conditions on grounds of vagueness and/or as not being crime related.

Dated: March 25, 2010

Respectfully submitted,

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